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No. 92-1512

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MONROE AUTO EQUIPMENT COMPANY,
a Delaware Corporation,
Petitioner,
v.
INTERNATIONAL UNION, UNITED AUTOMOTIVE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), MONROE AUTO EQUIPMENT COMPANY UNIT OF LOCAL 878,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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April 14, 1993

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Monroe Auto Equipment Company, Petitioner, whose written consent has been provided to the Clerk of the Court. Respondent International Union, United Automotive, Aerospace and Agricultural Implement Workers of America (UAW), Monroe Auto Equipment Company Unit of Local 878, after being asked, has refused consent. In support of this motion, EEAC, by the following, shows that its brief brings relevant matter to the attention of this Court that has not been (or will not be) presented by the parties.

1. EEAC is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 270 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. Its Board of Directors is composed of experts in labor and equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal aspects of employment-related policies and requirements.

2. As employers, most of EEAC's members and their constituents are government contractors who are required, or strongly encouraged, by federal contracting agencies to assure that employees working on government projects are "drug free." For example, Pub. L. No. 100-690, the Drug-Free Workplace Act of 1988, requires every federal contractor with a contract of $25,000 or more to achieve and maintain a "drug-free workplace"—or risk the loss of the federal contract. Further, numerous federal contracting agencies expressly prohibit contractors from reinstating workers who test positive for the use of illegal drugs.

3. Due in part to government anti-drug use policies reflected in statutes, regulations and other requirements, most of EEAC's members have adopted programs designed to prohibit the possession, use or influence of controlled substances on company premises or off company premises where it could adversely affect an employee's job performance or jeopardize the safety of other employees, the public or company property. Many have adopted procedures to test and/or search employees for the presence of drugs, much like the program adopted by the employer herein. When an employee tests positive or where drugs are discovered, many of EEAC's members do not reinstate the worker, especially into a job that involves safety or security risks either as a matter of law or as a matter of policy.

4. Accordingly, many of EEAC's members stand to be affected by the rule of law this Court adopts in deciding whether the Court of Appeals ruled incorrectly

when it enforced an arbitrator's award reinstating an employee in a safety sensitive position who tested positive for the use of illegal drugs on a workday and admitted often using illegal drugs. While EEAC's members firmly support the arbitration process and concur that arbitration awards generally should be insulated from judicial review, there are situations where, as here, an arbitration award violates an explicit, well-defined and dominant public policy, so that a court should refuse to enforce it. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987). Applying *Misco*, the Court of Appeals should have refused to enforce the arbitrator's award in this case, because it violated the explicit, well-defined and dominant public policy against reinstating acknowledged illegal drug users in safety sensitive positions.

5. Because of its broad interest in employment policy-related issues since mid-1976, EEAC has been the primary national organization representing the employer community as *amicus curiae* in equal employment law cases, filing over 320 *amicus curiae* briefs dealing with a wide range of equal employment and other labor law issues. As a part of this *amicus curiae* activity, EEAC has filed briefs in a number of cases involving drug testing by employers, including two cases decided by the United States Supreme Court.[1]

6. EEAC also filed comments in response to Notices of Proposed Rulemaking regarding drug testing issued

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[1] *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989); and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). In addition, EEAC filed a brief with the Supreme Court in *Burlington N.R.R. Co. v. Brotherhood of Locomotive Engr's*, 57 U.S.L.W. 3841 (June 26, 1989) (No. 87-1631), supporting a petition for a writ of certiorari. The Court, however vacated and remanded the Ninth Circuit's decision in light of *Skinner*.

EEAC also filed *amicus* briefs, and participated in oral argument before the National Labor Relations Board in several cases specifically involving drug testing in the collective bargaining context: *Johnson-Bateman Co.*, 295 NLRB No. 26 (1989); *Star Tribune*, 295 NLRB No. 63 (1989); *GTE Hawaiian Tel. Co. Inc.*, 296 NLRB No. 1 (1989).

by the Federal Aviation Administration, 53 Fed. Reg. 8368 (March 14, 1988); the Federal Railroad Administration, 53 Fed. Reg. 16640 (May 10, 1988); the Federal Highway Administration, 53 Fed. Reg. 22268 (June 14, 1988); the Urban Mass Transportation Administration, 53 Fed. Reg. 25892 *et seq.* (July 8, 1988); the Research and Special Programs Administration, *Id.*; the Coast Guard, *Id.*; the Nuclear Regulatory Commission, 53 Fed. Reg. 36795 (Sept. 22, 1988); and the Department of Defense, 53 Fed. Reg. 37763 (Sept. 28, 1988). Significantly, the Department of Transportation cited EEAC's comments in issuing its final rule, and, in accord with those comments, reversed its position on the issue of federal preemption of state laws. 53 Fed. Reg. 47002, *et seq.* (Nov. 21, 1988). Similarly, when the Nuclear Regulatory Commission published its fitness-for-duty rule, 54 Fed. Reg. 24467 (June 7, 1989), the NRC relied extensively upon EEAC's comments.[2]

7. EEAC has participated in a number of cases involving challenges to arbitration awards as violative of public policy. For example, in a recent case, the Eleventh Circuit agreed with the arguments advanced in EEAC's *amicus* brief that the district court properly set aside as contrary to public policy an arbitrator's award reinstating an illegal drug-using employee to a safety sensitive job. *Georgia Power Co. v. IBEW, Local 84*, 707 F. Supp. 531 (N.D. Ga. 1989), *aff'd mem.*, 896 F.2d 507 (11th Cir. 1990).[3]

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[2] *See Fitness for Duty in the Nuclear Power Industry: Responses to Public Comments*, NUREG-1354 (May 1989).

[3] EEAC has participated in other cases involving challenges to arbitration awards as violative of public policy, including *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983) (addressing EEOC conciliation agreement that conflicted with seniority provisions of collective bargaining agreement); and *Chrysler v. Allied Industrial Workers*, 959 F.2d 685 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 304 (1992) (urging the Court to review a lower court decision upholding an arbitration award reinstating an employee terminated for sexual harassment).

8. Further, because of its interest in the issues associated with substance abuse, EEAC, through a closely-related foundation, sponsored the preparation of two monographs concerning drugs in the workplace.[4]

9. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. EEAC seeks to assist the Court in this case by highlighting the impact its decision may have beyond the instant case in the field of workplace drug testing, use, possession and influence generally. Accordingly this brief brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties. Because of its significant experience, EEAC is uniquely situated to brief this Court on the relevant concerns of the business community and the significance of this case to employers.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests the Court to allow it to participate as *amicus curiae*.

Respectfully submitted,

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[4] *See Winning the War on Drugs: The Role of Workplace Testing*, by G. Tysse & Garen E. Dodge (1989); and *Drug and Alcohol Abuse in the Workplace: A Guide to the Issues*, by Stephen C. Yohay & J. Michael Walsh, Ph.D. (1987). Both were published by the National Foundation for the Study of Employment Policy (Washington, D.C.).

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*, contingent on the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth fully in the preceding motion.

STATEMENT OF THE CASE

Monroe Auto Equipment Company ("Monroe") employed David Rafko ("Rafko") as a mechanic. Rafko's

duties included installing experimental ride control mechanisms—shock absorbers and struts—in cars and trucks. In the installation of such mechanisms, Rafko operated power tools and equipment. These vehicles were then test driven at speeds often exceeding 50 m.p.h. on Michigan's public highways as well as Monroe's grounds. Sometimes, Rafko test drove these vehicles. Pet. App. B-2.[1] Clearly, Rafko was employed in a safety sensitive position.

Since 1985, Monroe has instituted an Alcohol and Drug Abuse Program whereby employees are subject to discharge for being under the influence of drugs or selling or using drugs on company property or on company time. Pet. App. C-3. In 1987, Monroe added to this policy provisions allowing the company to test employees suspected of being under the influence of drugs and prohibiting off-the-job illegal drug use "which could adversely affect an employee's job performance or which could jeopardize the safety of other employees, the public, or company equipment." Pet. App. C-4. The policy defined "under the influence" as follows:

> "[U]nder the influence" means that a person is affected by a drug or alcohol, or the combination thereof, in a detectable manner. The symptoms of influence are not necessarily confined to those consistent with misbehavior, nor limited to obvious impairment or physical or mental ability, such as slurred speech or difficulty in maintaining balance. *A determination of influence may be established by a professional opinion, [or] a scientifically valid test. . . .*

Pet. App. A-3 (emphasis added).

On Thursday, October 5, 1989, a workday, Monroe officials interviewed Rafko in conjunction with an internal

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[1] Citations to the Appendix to the Petition for a Writ of Certiorari are noted as Pet. App. ——. The opinion of the Court of Appeals for the Sixth Circuit below, reported at 981 F.2d 261, is reproduced as Pet. App. A-1 to A-18. The unreported opinion of the district court is reproduced as Pet. App. B-1 to B-13. The arbitrator's unreported decision and award are reproduced as Pet. App. C-1 to C-23.

investigation concerning drug dealing on company premises. While Rafko denied drug dealing, he admitted using marijuana the previous weekend and smoking two to three marijuana cigarettes the night before. Pet. App. C-11. That same day, Rafko consented to a drug test. Rafko tested positive for carboxy THC, a marijuana metabolite, at a level of 242 nanograms per milliliter ("ng/ml"). Accordingly, Monroe terminated Rafko's employment on October 12, 1989, for testing positive for illegal drug use and for being under the influence of illegal drugs when he was tested on October 5 in violation of Monroe's policy. Pet. App. B-3.

The Union filed a grievance challenging Rafko's dismissal. In arbitration, the Union stipulated that Rafko's drug tests were accurate. Pet. App. B-3. An expert witness testified that impairment from marijuana exists at 60-100 ng/ml of urinary carboxy THC and that Rafko's 242 ng/ml THC level impaired his judgment and ability to perform safely any integrated task, such as driving or operating power tools. *Id.* "Rafko's test result was far above suggested levels both for being under the influence and being impaired." Pet. App. A-4. The expert concluded that Rafko was working under the influence of marijuana when he was tested on October 5. *Id.*

The arbitrator, however, ordered Rafko's reinstatement to a safety sensitive position despite the fact that he admitted often using illegal drugs, he admitted using a significant amount of illegal drugs the night before the workday in question and he tested positive at a significantly high level for the use of illegal drugs on a workday, all of which were in violation of Monroe's clearly established policy prohibiting such drug use.

The arbitrator based his decision on the premise that the drug use occurred off-premises and therefore was addressed by that part of Monroe's policy applicable to off-the-job use. He then interpreted the policy to require a showing by Monroe that Rafko's off-duty use of marijuana "actually interfered" with his job performance, de-

spite the company's clear policy which required only a showing by the company that an employee's off-duty use of drugs "could" adversely affect his performance or "could" jeopardize the safety of other employees, the public, or the company. The arbitrator also ignored the company policy whereby employees are subject to discharge for being under the influence of drugs on company premises or company time and that symptoms of "influence" are not necessarily confined to those consistent with misbehavior, nor limited to obvious impairment or physical or mental ability, but could be established by a professional opinion (Dr. Hayden) or valid test (242 ng/ml of marijuana metabolite). Pet. App. C-21, 22.

The arbitrator concluded that Monroe failed to make a showing that Rafko's off-duty use of marijuana actually interfered with his job performance and that there are no clearly established standards for determining the degree of being under the influence of marijuana. *Id.*

Monroe brought suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, asking that the arbitrator's award be vacated because it violated "an explicit, well-defined and dominant public policy against the employment of drug-using individuals in potentially hazardous or dangerous positions." On cross-motions for summary judgment, the district court affirmed the arbitration award and ordered enforcement.

Both parties appealed to the Court of Appeals for the Sixth Circuit. In a 2-1 decision, the Sixth Circuit affirmed the district court's decision stating that "Monroe did not identify law or legal precedents which indicate that the award violated a well-defined and dominant public policy." Pet. App. A-15. In dissent, Judge Nelson pointed out that drugs were in Rafko's system while "on the job." Because the undisputed evidence showed that he was under the influence of marijuana while on company premises and company time, the dissent argued that the effect on job performance "is simply irrelevant." Pet. App. A-18. Monroe has petitioned this court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Court of Appeals failed to follow the clear direction of this Court in *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), and *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), because it affirmed a district court's decision to uphold an arbitrator's award reinstating an employee in a safety sensitive position who tested positive on a workday for the use of illegal drugs and who admitted often using illegal drugs. Such an award violates the explicit, well-defined and dominant national policy against the reinstatement of acknowledged illegal drug using employees in safety sensitive positions. Moreover, because that national policy affects thousands of employers throughout the country, the Court of Appeals' error raises an issue of nationwide importance warranting review by this Court.

In affirming the district court's decision, the Sixth Circuit has produced a result whereby the jobs of acknowledged illegal drug users are protected unless employers can show the worker is "actually impaired" on the job. This result would occur even when, as here, an undisputed drug test shows the actual presence of illegal drugs at more than two and one-half times the generally accepted level that the government uses to put into play its prohibitory drug testing restrictions. Such a result incorrectly presumes that illegal, drug-induced impairment will be easily identifiable, and improperly requires employers to bear the risks resulting from having drug-impaired workers on the job.

Additionally, such a result ignores numerous national antidrug statutes, regulations, orders and court decisions establishing a national public policy against drugs in the workplace which not only guards against the employment of individuals in safety sensitive positions found to be actually impaired or intoxicated on the job, but also guards against the employment of individuals in safety sensitive positions who test positive for the use of illegal drugs and admit often using illegal drugs. Such a national public policy can be ascertained from laws and legal

precedents such as the Mandatory Guidelines for Federal Workplace Testing Programs (establishing an initial cut-off level of 100 ng/ml for determining a positive result for marijuana metabolites), the regulations of federal agencies (prohibiting federal contractors from reinstating workers who test positive for the use of drugs), and general laws like the Drug-Free Workplace Act of 1988 (requiring every federal contractor with a contract of $25,000 or more to achieve and maintain a "drug-free workplace" or risk the loss of the federal contract).

REASONS FOR GRANTING THE WRIT

I. BY UPHOLDING THE REINSTATEMENT OF AN ACKNOWLEDGED USER OF ILLEGAL DRUGS TO A SAFETY SENSITIVE POSITION IN CONTRAVENTION OF A WELL-DEFINED, DOMINANT PUBLIC POLICY, THE COURT OF APPEALS' DECISION THREATENS THE EFFECTIVENESS OF EMPLOYER DRUG-ABUSE TESTING AND PREVENTION PROGRAMS THROUGHOUT THE NATION, THEREBY RAISING AN IMPORTANT ISSUE WARRANTING REVIEW BY THIS COURT

A. Under This Court's Decisions in *W.R. Grace* and *Misco*, a Court Should Vacate an Arbitrator's Award That Violates an Explicit, Well-defined and Dominant Public Policy that the Court Ascertains by Reference to the Laws and Legal Precedents

A court is prohibited from enforcing a bargaining agreement that is "contrary to public policy." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (citing *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983)). As the Court noted in *Misco* and *W.R. Grace*, such a doctrine derives from the more general legal doctrine that a court must not enforce contracts that violate the law or some other policy. *Id.* A district court may refuse to enforce an arbitrator's interpretation of a contract as long as such a refusal to enforce is:

> limited to situations where the contract as interpreted would violate 'some explicit public policy' that is

> 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests.'

Misco, 484 U.S. at 43 (quoting *W.R. Grace*, 461 U.S. at 766). Indeed, it should be noted that the question of whether such a public policy exists is "ultimately one for resolution by the courts." *Id.*

B. The Court of Appeals Acted Contrary to Public Policy By Holding That the Only Time an Arbitrator's Award Violates the Explicit, Well-defined and Dominant Public Policy Against Drugs in the Workplace Is When the Arbitrator Reinstates an Employee Who Was Found Actually to be Impaired or Intoxicated on the Job

The Sixth Circuit held that Monroe did not identify law or legal precedents which indicate that reinstating Rafko violated a well-defined and dominant public policy because Monroe did not prove that Rafko was actually impaired or intoxicated while performing his duties. Pet. App. A-15. The Sixth Circuit based its holding on the faulty reasoning of the arbitrator that since there allegedly is no established legal standard defining whether someone is under the influence of marijuana, no one can be determined to be under the influence of marijuana absent some physical manifestation even when such usage greatly exceeds federal testing levels. By upholding the arbitrator's order of reinstatement, the Sixth Circuit for all practical purposes has protected the jobs of acknowledged illegal drug users unless employers can show the worker is "actually impaired" on the job.

There are three basic problems with such a result. First, it presumes that illegal drug-induced impairment, in the same manner as alcohol-induced impairment, generally will be easily identifiable. The result suggests that if impairment cannot be observed readily, then impairment does not exist, even though drug use has been established. Federal Judge Richard Arnold of the Eighth Circuit articulated the problem with relying exclusively on observed

impairment in his opinion in *Brotherhood of Maint. of Way Employees v. Burlington N.R.R. Co.*:

> [T]he use or abuse of marijuana and other illegal drugs frequently does not produce an externally obvious state of impairment. . . . It is the insidious nature of these substances that too often the user's faculties are impaired and the damage done through a serious error on his part before he realizes that he is impaired and without any outward sign of his impairment that could lead a supervisor or other person to intervene.

802 F.2d 1016, 1020 (8th Cir. 1986). In other words, drug-induced impairment may not be observed readily and may not manifest itself until the damage has been done.

Second, it is beside the point whether a drug test, in and of itself, can conclusively demonstrate current impairment. A confirmed, positive result does allow the employer rationally to conclude that there has been recent drug use that creates the possibility of current impairment, as well as a risk of future impairment—perhaps while on the job—as a result of subsequent use. Especially in a safety sensitive job, employers need the ability to determine that, given reliable evidence of recent illicit drug use, they should not have to assume the risk that an individual is impaired or might repeat past behavior and become impaired while on the job.

Third, and most important, the decision below ignores the adverse, potentially serious, consequences of impairment on the job that can result from an employee's drug use, and effectively prevents employers from taking steps to minimize those adverse consequences.

It is well established that drugs can create cognitive, perceptual, and judgmental problems; deficiencies in hand-eye and fine motor coordination; as well as other neuromuscular and psychomotor dysfunctions. *See* H. Moskowitz, *Adverse Effects of Alcohol and Other Drugs on Human Performance*, Alcohol, Health and Research

World, Vol. 9(4) 11-15 (Summer 1986). If employees believe they can use drugs on the job and will not be caught unless they are observed in an obvious state of impairment—a difficult judgment for a supervisor or a fellow employee to make—then human nature strongly suggests that on-the-job drug use will continue. If it does, then it creates a potentially serious accident waiting to happen. Thus, the deterrent effect of drug testing is critical. If employees recognize that evidence of drug use by means of a drug test can jeopardize their jobs, they should be much less likely to use drugs. The result is a safer and more productive workplace.

In upholding the Federal Railroad Administration's regulation (Rule G), requiring mandatory post-accident drug testing in the *Skinner* case, Supreme Court Justice Anthony Kennedy discussed the importance of the deterrent effect of drug testing:

> While no procedure can identify all impaired employees with ease and perfect accuracy, the FRA regulations supply an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place. [Citation omitted.] The railroad industry's experience with Rule G persuasively shows, and common sense confirms, that the customary dismissal sanction that threatens employees who use drugs or alcohol while on duty cannot serve as an effective deterrent unless violators know that they are likely to be discovered. By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, [citation omitted] concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.

Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602, 629-30 (1989).

Not only is the decision below violative of these principles but, as shown below, the decision also conflicts with the national public policy against drugs in the workplace which guards against the employment of individuals in safety sensitive positions found to be actually impaired or intoxicated and guards against the employment of acknowledged illegal drug using employees.

C. The Court of Appeals Ignored the National Anti-Drug Statutes, Regulations, Orders and Court Decisions Establishing a National Public Policy Against Drugs in the Workplace Which Not Only Guards Against Reinstating Employees Who Are Found to be Actually Impaired on the Job, But Also Guards Against Reinstating Acknowledged Illegal Drug Using Employees in Safety Sensitive Positions

The Court of Appeals erroneously held that the only time an arbitrator's award violates the explicit, well-defined and dominant public policy against drugs in the workplace is when an arbitrator reinstates an employee who was found to be actually impaired on the job. By so holding, the Court of Appeals ignored the national anti-drug statutes, regulations, orders and court decisions establishing an explicit, well defined and dominant public policy against drugs in the workplace. These policy statements not only guard against reinstating employees who are found to be actually impaired on the job, but also guard against reinstating acknowledged illegal drug using employees in safety sensitive positions. The Sixth Circuit thus has failed to ascertain "by reference to the laws and legal precedents" whether the arbitrator's award "created any explicit conflict with other 'laws and legal precedents.'" *Misco*, 484 U.S. at 43 (quoting *W.R. Grace*, 461 U.S. at 766). Indeed, as Judge Nelson opined in his dissent from the Sixth Circuit's majority opinion, "the brand of industrial justice dispensed . . . is out of harmony, to say the least, with the well-defined public policy reflected in the nation's drug laws." Pet. App. A-18. Even the arbitrator admitted that "[i]llegal drugs are a scourge on society and it is undebatable that their use

and distribution can not be tolerated in the workplace." Pet. App. C-20.

The landscape of the American workplace has changed dramatically over the course of the last decade. Health and safety issues have commanded increased attention, especially with respect to substance abuse on the job. Indeed, numerous federal courts have recognized a dominant public policy against drug use, possession or influence in the workplace.[2] Additionally, over the past several years, a formidable array of national statutes, regulations, and executive orders have established a national policy that no longer tolerates workplace drug use, possession or influence.

1. *Rafko's Test Results of 242 ng/ml of marijuana Far Exceeded Federal Guidelines of 100 ng/ml (Which the Government Has Proposed Dropping to 50 ng/ml)*

Pursuant to Presidential Executive Order 12564, the U.S. Department of Health and Human Services (HHS) issued Mandatory Guidelines establishing technical procedures that must be followed by federal agencies for drug testing of their own employees. *Mandatory Guidelines for Federal Workplace Testing Programs,* 53 Fed. Reg. 11970 (April 11, 1988). These Mandatory Guidelines promulgate that "any agency may require a contractor to test its own employees following the procedures in the Guidelines by making the requirement a term or condition of the contract." *Id.* at 11975 ¶ 21.

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[2] *See, e.g., Georgia Power Co. v. IBEW, Local 84,* 707 F. Supp. 531 (N.D. Ga. 1989), *aff'd mem.,* 896 F.2d 507 (11th Cir. 1990); *Oil Workers Local 4-228 v. Union Oil Co.,* 818 F.2d 437, 442 (5th Cir. 1987); *S.D. Warren Co. v. United Paper Workers Int'l Union,* 815 F.2d 178, 186 (1st Cir. 1987); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l,* 861 F.2d 665 (11th Cir. 1988), *cert. denied,* 493 U.S. 871 (1989); *Iowa Elec. Light and Power Co. v. Local Union 204 of IBEW,* 834 F.2d 1424 (8th Cir. 1987); *Union Pac. R.R. Co. v. United Transp. Union,* 794 F. Supp. 891, 894 (D. Neb. 1992); *Exxon Shipping Co. v. Exxon Seamen's Union,* 801 F. Supp. 1379, 1388 (D.N.J. 1992) ("Exxon I"); *Exxon Shipping Co. v. Exxon Seamen's Union,* 788 F. Supp. 829, 843 (D.N.J. 1992) ("Exxon II").

Recently, the Department of Health and Human Services (HHS), has published proposed revisions to these Guidelines. *See* 58 Fed. Reg. 6062 (Jan. 25, 1993). These proposed revisions are technical in nature, reflecting the technological advances that have improved the accuracy and reliability of drug testing. In one of the most significant proposed changes, the initial cutoff level for establishing a positive result for marijuana metabolites is lowered from 100 ng/ml to 50 ng/ml. *Id.* at 6063. Many private sector drug testing programs use a lower cutoff level than 100 ng/ml, contending that the Guideline cutoff of 100 ng/ml was not supported by scientific evidence. The proposed change is a recognition of this argument. Significantly, Rafko's tested level was 2.42 times higher than the standard accepted by the federal government to establish a "positive result." Now, the federal government is proposing to lower the standard from 100 to 50. *Id.*

The Guidelines have been incorporated, with only minor modifications, into the drug testing requirements applicable to private employers regulated by the Department of Defense, Transportation, Energy, and the Nuclear Regulatory Commission.

In fact, federal agencies have considered the workplace use, possession or influence of illegal drugs to be such a compelling violation of our national policy that these agencies have invoked unusual procedures to respond. For example, the Department of Defense (DOD) bypassed the traditional "notice of proposed rulemaking" (NPRM) process, and instead used its "interim rule" procedures in adopting new rules for its contractors. 53 Fed. Reg. 37763, 37764 (Sept. 28, 1988).[3]

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[3] Such interim rule procedures are authorized only "if urgent and compelling circumstances" make the NPRM process impracticable. 41 U.S.C. § 418(b)(d). Indeed, the interim rules themselves note that they are "necessary to implement policy . . . in keeping with Federal goals to eliminate the use of illegal drugs and provide for a drug-free work force." 53 Fed. Reg. at 37764 (Sept. 28, 1988).

Under the DOD's interim regulations, DOD contractors are required to include a "drug-free workforce" clause in "(a) [a]ll con-

2. *Reinstatement of Employees Who test Positive for Illegal Drug Usage Is Prohibited By Many Federal Regulations*

By affirming the arbitrator's reinstatement of an admitted illegal drug user, the Sixth Circuit acted contrary to a clear public policy prohibiting such reinstatement. Significantly, the DOD rule discussed above prohibits covered employers from permitting an "employee to remain on duty . . . who is found to use illegal drugs until such time as the contractor . . . determines that the employee may perform in such a position." *Id.* at 37765.

In 1989, the DOD issued a list of Questions and Answers designed to provide guidance to covered contractors until the final regulations were published in the Federal Register. One Question and Answer reiterates the regulation (with minor changes) as follows:

> Q: What happens to an employee who tests positive?
>
> A: Contractors shall adopt appropriate personnel procedures to deal with employees who are found to be using drugs illegally. *Employees in sensitive positions may not continue to remain on duty insofar as concerns the DOD contract until the contractor, in accordance with contractor-established procedures, determines the employee may return to work in the sensitive position.* (Emphasis added.)

Clearly, therefore, "positive law" prohibits DOD contractors from reinstating workers who test positive for the use of illegal drugs.

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tracts involving access to classified information; [and] (b) [a]ny other contract when the contracting officer determines that inclusion of the clause is necessary for reasons of national security or for the purpose of protecting the health or safety of those using or affected by the product . . ." except in the case of contracts for "commercial" products. 53 Fed. Reg. 37763, 37764 (Sept. 28, 1988). The interim rule states that DOD contractors must "institute and maintain a program for achieving the objective of a drug-free work force," including supervisory training to spot drug use, provisions for employee self-referrals, and "testing on a controlled and carefully monitored basis." The regulations went into effect on October 31, 1988, for solicitations and contracts issued on or after that date.

Similarly, six separate agencies of the Department of Transportation (DOT)—The Federal Railroad Administration (FRA), the Federal Highway Administration (FHWA),[4] the Federal Aviation Administration (FAA),[5] the Research and Special Programs Administration (RSPA),[6] the Coast Guard,[7] and the Urban Mass Transporation Administration (UMTA)[8]—all issued drug testing requirements applicable to private sector employers under their jurisdiction. 53 Fed. Reg. 47001, *et seq.* (November 21, 1988). Each of the DOT agency testing regulations have features which are unique to the sector being regulated, yet all require:

- pre-employment testing for safety-sensitive positions;
- employee testing for safety-sensitive positions; periodically; for reasonable cause; after a serious accident; and on a *random* basis;
- an employer's written anti-drug policy;
- employee and supervisory training;
- employee assistance programs; and
- preemption of inconsistent state and local laws (except UMTA).

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[4] The Ninth Circuit rejected five separate lawsuits challenging the FHWA regulations and upheld "a massive drug testing program that will touch the lives of literally millions of citizens." *Teamsters v. Department of Transp.*, 932 F.2d 1292 (9th Cir. 1991). Recently, the FHWA published a final rule requiring employers subject to the FHWA's existing drug testing regulations to begin implementing random and post-accident testing for covered commercial motor vehicle drivers. 56 Fed. Reg. 40806 (August 16, 1991).

[5] The FAA regulations were upheld against constitutional challenge in *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 954 (1991).

[6] Upheld in *IBEW, Local 1245 v. Skinner*, 913 F.2d 1454 (9th Cir. 1990) (random and other "suspicionable" testing not prohibited by the Fourth Amendment).

[7] See, 56 Fed. Reg. 31030 (July 8, 1991).

[8] Regulations were enjoined in *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362 (D.C. Cir. 1990).

More importantly, nearly all of these DOT regulations prohibit the immediate reinstatement of employees who test positive for the use of illegal drugs. For example, the FAA rule states that a certificate holder or operator may not "use any person to perform" if that person has failed a test (or has refused to submit to a test) until that person has received a recommendation to "return to duty" from a medical review officer. 14 C.F.R. § 135.249(c). *See* 53 Fed. Reg. 47024, 47061 (Nov. 21, 1988). Similarly, the RSPA rules prohibit an operator from knowingly using an employee who fails a drug test or who refuses to take a drug test unless authorized by a medical review officer. 49 C.F.R. § 199.9. *See* 53 Fed. Reg. 47084, 47097 (Nov. 21, 1988). Likewise, the FHWA rule states that "a driver shall be disqualified . . . for a period of 1 year for a positive test of controlled substance use when the driver has been involved in a fatal accident" or for "a refusal to give a urine sample when the driver has been involved in a fatal accident." 49 C.F.R. § 391.117(b), (a). *See* 53 Fed. Reg. 47134, 47154 (Nov. 21, 1988).

The FRA regulations are even more stringent: a worker who refuses to provide a sample is disqualified from service for nine months, and an employee who tests positive must be suspended and removed from service until he tests negative, is evaluated by an EAP counselor, and completes a counseling or treatment course. Even then, he is subject to follow-up testing without notice for 60 months after his return to service. 49 C.F.R. §§ 219.603 and .605. *See* 53 Fed. Reg. 47102, 47129 (Nov. 21, 1988).

Further, the U.S. Department of Energy (DOE) has published a final rule requiring DOE contractors to implement mandatory drug testing for applicants and employees in "testing designated positions." 57 Fed. Reg. 32652 (July 22, 1992). The rules, which went into effect on August 21, 1992, also obligates prime contractors to require their subcontractors to comply with the rule as a condition for award of the subcontract. The final rule

requires DOE contractors and subcontractors to implement a substance abuse program, including drug testing of applicants and employees in testing for designated positions (for example, health, safety, and/or security sensitive jobs), at sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act. Besides mandatory drug testing, minimum requirements include prohibition on the use, possession, sale, distribution, or manufacture of illegal drugs; education and training of employees; employee assistance; and removal, discipline, treatment, and rehabilitation of employees. The rule is closely modeled after the DOE's program covering its own employees. Covered contractors must submit a written copy of their program to DOE as a condition of the contract. The rule requires the immediate removal from a testing designated position of any employee who tests positive for illegal drug use.

The Nuclear Regulatory commission (NRC) issued its final "fitness-for-duty" regulations for licensees authorized to construct or operate nuclear power reactors. 54 Fed. Reg. 24468 (June 7, 1989). The rules require NRC licensees to establish and implement written policies and procedures designed to meet the NRC fitness-for-duty rule.[10] Within the scope of this program, licensees must test for substance abuse in the following circumstances: (1) within 60 days prior to granting unescorted access to protected areas; (2) on a random testing rate established at 100 percent per year; (3) for cause, after certain accidents, or when credible information is received that an individual is abusing a substance; and (4) as a follow-up to verify continued abstention. Again immediate reinstatement is not permitted.

Clearly, therefore, many companies are prohibited by law from reinstating workers who test positive for the use of illegal drugs or who admit using illegal drugs. Rein-

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[10] Contractors and vendor personnel performing certain activities for a licensee must be subject either to the licensee's program or to a written program reviewed and approved by the license.

statement of these workers by an arbitrator would not only violate public policy, but federal law as well.

3. *Other Federal Restrictions Establish a Public Policy Supporting Anti-Drug Abuse Policies, Including the Drug-Free Workplace Act*

A number of other general laws further compel the conclusion that there now exists a well-defined and dominant public policy against drugs in the workplace.[11] These general laws put increasing pressure on private employers to assure that their employees are drug free.

A clear example of this general policy against drugs in the workplace is the Anti-Drug Abuse Act, which went into effect on March 18, 1989. As part of this comprehensive omnibus law, Congress adopted the Drug-Free Workplace Act of 1988, a law that applies directly to most of the companies that comprise the *amicus* EEAC. The Drug-Free Workplace Act requires covered federal contractors (with contracts of $25,000 or more) and grantees to certify to the applicable contracting agency that they are providing a "drug-free workplace." 41 U.S.C. § 701, *et seq.*, Pub. L. No. 100-690. To comply with the act, private employers with federal contracts must:

(1) publish a statement notifying their employees that the unlawful manufacture, distribution, dispensation, *possession* or *use* of a controlled substance *is prohibited in the workplace*;

(2) give employees a copy of this statement;

(3) notify their employees that their *continued employment is conditional upon compliance with the policies outlined in the statement,* and that they have the obligation to inform the contractor of any conviction of a workplace drug

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[11] Additional discussion of the national anti-drug policy is set out in some detail in *Georgia Power Co. v. IBEW, Local 84*, 707 F. Supp. 531, 536-38 (N.D. Ga. 1989), *aff'd mem.*, 896 F.2d 507 (11th Cir. 1990) (arbitrator's award reinstating illegal drug user to position requiring operation and supervision of potentially hazardous electrical equipment and machinery was contrary to public policy).

crime—such as the possession of drugs on company premises;

(4) notifying the contracting agency within 10 days of receiving notice of an employee's workplace-related drug conviction to establish a drug-free awareness program to inform their employees about the dangers of drug abuse in the workplace;

(5) Impose some type of sanction upon an employee who has been convicted of a workplace drug crime;

(6) Establish a "drug-free awareness program" to inform workers about the dangers of workplace drug abuse, and the penalties for drug abuse violations; and

(7) *Make a "good faith effort" to continue to maintain a drug free workplace.*

Contractors who fail to comply with the act are subject to possible contract termination suspension or debarment. Indeed, contractors are at risk of suspension or debarment where a "number" of employees are convicted of on-the-job drug violations. *See Drug-Free Workplace Requirements; Notice and Interim Final Rules for 14 Departments and 24 Agencies,* 54 Fed. Reg. 4945, 4968 (Jan. 31, 1989).[12]

President Reagan, on September 15, 1986, signed Executive Order 12564, thereby establishing a "Drug-Free Federal Workplace." The Executive Order calls for drug testing of federal employees in sensitive positions and of other employees reasonably suspected of drug use. The Executive Order notes:

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[12] The district court in *Georgia Power* noted that "[t]he people have also recognized the strong need to maintain safe work environments. To this end, Congress has enacted the Occupational Safety and Health Act." 707 F. Supp. at 538. *See* 29 U.S.C. § 651 *et seq.* That law requires employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees." *Id.*

> *The use of illegal drugs,* on or off duty, by Federal employees is *inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;* Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs; [t]he use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. *The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other federal employees;* . . . .

51 Fed. Reg. 32889 (Sept. 17, 1986) (emphasis added).[13]

Additionally, as part of the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, the Department of Transportation recently published a Notice

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[13] The Order also declares,

> Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of local productivity each year; *the Federal government, as an employer,* is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity; the Federal government, as the largest employer in the Nation, *can and should show the way towards achieving drug free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;* . . . .

Executive Order 12564 (emphasis added).

Congress also has enacted the Controlled Substances Act as part of the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236. Through this act, the people have declared, "[t]he illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2).

of Proposed Rulemaking (NPRM) that would require mandatory alcohol testing for some seven million workers in the transportation industry, many of whom are employed by private sector companies. 57 Fed. Reg. 59382 (Dec. 15, 1992). The proposal would modify DOT's existing drug testing regulations to conform to changes required by P.L. 102-143, including expansion of coverage and modernizing drug testing procedures.

By upholding the reinstatement order in this case in disregard of these national policy concerns, the Court of Appeals not only erred, but adopted a rule of law that threatens employers throughout the country with conflicting obligations that can only hamper and deter their efforts to eliminate illegal drugs from the workplace.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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